June 23, 2008

Via Electronic Filing

Mr. Matthew Berry
General Counsel
Federal Communications Commission
445 Twelfth Street, SW,
Washington, DC 20554

Re: WT Docket Nos. 07-195 & 04-356 – Written *Ex Parte* Submission

Dear Mr. Berry:

M2Z respectfully submits this response to claims made by CTIA in an *ex parte* letter filed on June 18, 2008, in the above captioned dockets.[1] As explained more fully below, each of the various constitutional, statutory, and procedural claims set forth in CTIA's latest offering is without merit, and the cases that CTIA cites do nothing but undermine its positions. M2Z responds nonetheless in order to correct the record regarding a hodgepodge of meritless allegations pertaining to notice deficiencies, retroactive effects, unconstitutional takings, and breaches of contract that (in CTIA's view) purportedly could arise from the Commission's adoption of neutral service and technical rules for the AWS-3 band.

CTIA's assertions founder primarily because of its refusal to acknowledge the Commission's considerable authority to regulate the use of radio spectrum generally, and to conduct and conclude rulemakings on spectrum policy issues that may have an impact on the operations of existing spectrum licensees. The Commission grants spectrum licenses limited "for periods of time" and "no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."[2] Furthermore, it is beyond dispute that the Commission has the authority even to alter the terms and conditions of previously granted licenses "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity."[3]

[1] *See* Letter from Christopher Guttman-McCabe, CTIA, to Ms. Marlene H. Dortch, WT Docket Nos. 04-356, 07-195 (filed June 18, 2008) ("CTIA June 18 *Ex Parte*").

[2] 47 U.S.C. § 301.

[3] *Id.* § 316(a)(1).

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At the outset, however, M2Z must note that – contrary to CTIA's position – the Commission would not be *altering* anything relating to AWS-1 licenses if it were to authorize two-way use of the AWS-3 band or adopt the neutral service rules supported by M2Z and others. CTIA's latest filing offers no evidence of any such change or modification to existing licensees' authorizations, nor any proof of cognizable harm to such licensees that would be fairly traceable to the Commission's decision in this proceeding. The CTIA June 18 *Ex Parte* does nothing to refute the technical record developed in this proceeding by M2Z with regard to the limited potential for harmful interference between incumbent licensees and the AWS-3 licensee.[4] For example, in earlier submissions we have demonstrated that even without the employment of mitigation techniques that would be available to the eventual AWS-3 licensee, the worst case scenario for interference to an AWS-1 user would predict the occurrence of such an event once every few months at most.[5] M2Z also has demonstrated the propriety and effectiveness of the Commission's typical out-of-band emissions limits for the AWS-3 band;[6] described the mitigation techniques that could be employed to decrease even further the potential for harmful interference; and answered other concerns about harmful interference consistently and objectively by providing sound engineering data and analysis throughout the course of this lengthy proceeding.[7]

Despite M2Z's showings, CTIA assumes in its latest filing the truth of a proposition that it has not proved, claiming in its June 18 letter that harmful interference to the AWS-1 and PCS bands from mobile transmission in the AWS-3 spectrum will diminish the utility and value of licenses held by incumbents in these other bands.[8] Starting from that unsound premise, CTIA speculates that proposed technical rules allowing mobile transmissions in AWS-3 would harm the integrity of Commission spectrum auctions through a combination of purported constitutional, statutory, and regulatory violations. In reality, this litany of complaints cannot withstand scrutiny.

The Commission Provided Sufficient Notice of the Potential for Mobile Transmissions in Bands Adjacent to Certain AWS-1 and Broadband PCS Spectrum Blocks

CTIA first claims that AWS-1 and broadband PCS licensees purchased their licenses under the "reasonable assumption" that they would be free from harmful interference caused by adjacent-channel operations.[9] CTIA then argues that, despite M2Z's past showings to the contrary, "AWS-1 licensees were not 'on notice' of the fact that adjacent operations in the

[4] *See, e.g.*, Letter from Uzoma C. Onyeije, M2Z, to Ms. Marlene H. Dortch, WT Docket Nos. 07-195 & 04-356, at 3-4, nn. 8, 11 (filed June 3, 2008); Letter from Uzoma C. Onyeije, M2Z, to Marlene H. Dortch, Esq., WT Docket Nos. 07-195 & 04-356, at 2-4 (filed June 17, 2008) ("M2Z June 17 *Ex Parte*").

[5] *See* M2Z Reply Comments, WT Docket No. 07-195, at 13 (filed Jan. 14, 2008).

[6] *See, e.g.*, M2Z June 17 *Ex Parte* at 2-4.

[7] *See, e.g.*, M2Z Comments, WT Docket No. 07-195, at 12-13, 38-44 (filed Dec. 14, 2007).

[8] *See* CTIA June 18 *Ex Parte* at 1.

[9] *Id.* at 2.

2155-2175 MHz band could limit the utility of portions of the spectrum."[10] Yet CTIA concedes, as it must, that "the Commission envisioned that it might use the AWS-3 band to support TDD operations"[11] and therefore that the Commission might indeed have been expected to authorize mobile transmissions in the 2155-2175 MHz band. Beyond envisioning this prospect, the Commission announced its intention in its 2003 *AWS-1 Service Rules Order* to "make every effort to provide spectrum opportunities for TDD systems in future allocation and spectrum proceedings, such as in the *AWS Allocation* proceeding."[12] It would be hard to imagine clearer notice to prospective AWS-1 licensees.

Furthermore, these clear indications were available to "interested bidders . . . in advance of the auction"[13] for AWS-1 spectrum, fully satisfying any obligation under Section 309(j) that the Commission may have to provide such advance notification. The Commission's highly successful Auction No. 66 took place in 2006, as CTIA's submission confirms,[14] some three years after the publication of these Commission's orders clearly indicating that TDD operations could be authorized in the spectrum blocks that came to be part of the present AWS-3 band.

In its last notice argument, CTIA refers back to broadband PCS auctions held in the mid-1990s and claims that incumbent PCS licensees also were deprived of notice of possible interference. While focused entirely on the Commission's Section 309(j) notice obligations (for which, it should be noted, the CTIA June 18 *Ex Parte* provides no specific quote or cite to the statute), CTIA fails to give proper regard to other provisions in the Communications Act that give the Commission considerable authority to grant and modify licenses.[15] The Commission can, of course, alter the terms and conditions of a license – as demonstrated by the cases on which CTIA itself relies – and it can do so without being susceptible to claims of inadequate notice, or to the charges of uncompensated takings, retroactive rulemaking, or breach of contract discussed below.

[10] *Id.* at 3.

[11] *Id.*

[12] *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, ¶ 46 (2003) ("*AWS-1 Service Rules Order*") (emphasis added); *see also Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2233, ¶ 69 (2003) ("[T]he 2155-2180 MHz band could be used to support TDD operations in a 15 megahertz portion and as relocation spectrum for MDS in the remaining 10 megahertz portion.").

[13] CTIA June 18 *Ex Parte* at 4 (emphasis in original).

[14] *See id.* at 2.

[15] *See, e.g.*, 47 U.S.C. §§ 301, 316(a)(1).

Commission Action to Authorize Mobile Transmissions in the AWS-3 Band Would Not Constitute a Taking, a Retroactive Rule Change, or a Breach of Contract with Prior Spectrum Auction Winners

CTIA's arguments regarding the specter of takings, retroactivity, and contract breaches are no more convincing than its notice arguments. As it ponders the supposed problems that the AWS-3 decision *may* cause, CTIA suggests that contemplated agency action "may render" earlier actions *ultra vires*, "may constitute" a taking, or "may violate" implied contractual relationships between the Commission and its licensees.[16] From the qualified tone of these statements alone, it appears that CTIA may doubt the strength of the arguments in its June 18 *Ex Parte*. CTIA's doubts are well-placed.

First and foremost, the takings argument is a non-starter.[17] CTIA cites no precedent finding a license modification to be a taking. In fact, "courts have held that under the Communications Act, licensees have no property rights in radio licenses"[18] and recognized "that the Commission has the authority to alter the terms of an existing license by rulemaking."[19] This lack of property rights should be unsurprising – despite CTIA's insistence that the Commission "sell[s]" spectrum to bidders[20] – as the Communications Act makes clear that the Commission licenses radio channels "to provide for the use of such channels, but not the ownership thereof" by licensees.[21] The fact that a licensee has obtained its license at auction does not change this analysis in the slightest.[22] As the Court of Appeals

[16] CTIA June 18 *Ex Parte* at 4-6.

[17] *See id.* at 5.

[18] *Improving Public Safety Communications in the 800 MHz Band*, Second Memorandum Opinion and Order, 22 FCC Rcd 10467, ¶ 16 (2007) ("*800 MHz Second Memorandum Opinion and Order*") (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) ("No licensee obtains any vested interest in any frequency."); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S 775, 805-06 n.25 (1978)).

[19] *Id.* (citing *United States v. Storer Broadcasting*, 351 U.S. 192, 205 (1956); *Committee for Effective Cellular Rules v. FCC*, 53 F3d 1309, 1319-20 (D.C. Cir. 1995)).

[20] CTIA June 18 *Ex Parte* at 4.

[21] 47 U.S.C. § 301.

[22] *800 MHz Second Memorandum Opinion and Order* ¶ 35.

> We disagree with North Sight's claim that the Commission may not apportion the North Sight spectrum currently in the ESMR band because "to do so would deprive North Sight of spectrum, purchased at auction, with absolutely no reimbursement to North Sight for the value of that spectrum." Neither North Sight nor any other Commission licensee has a property interest in the market value of a spectrum license.

Id.; *see also Amendment of the Commission's Rules Regarding Maritime Automatic Identification Systems*, Report and Order and Further Notice of Proposed Rulemaking and Fourth Memorandum Opinion and Order, 21 FCC Rcd 8892, ¶ 46 (2006) ("To recognize a takings claim in this context would require, as a prerequisite, that [the licensee] be deemed to hold a vested property interest in the [ ] spectrum licensed to it. However, the Act forecloses a licensee's assertion of an ownership interest in the licensed spectrum."); *Morning Star Satellite Company, L.L.C. Application for Authority to Construct, Launch, and Operate a Ka-band Satellite System in the Fixed-Satellite Service at Orbital Locations 62° W.L., 30° E.L., 107.5° E.L., and 147° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11550, ¶ 13 (2001).

for the District of Columbia Circuit held just two years ago in *Mobile Relay Associates v. FCC*, Commission licenses "confer the right to use the spectrum for a duration expressly limited by statute subject to the Commission's considerable regulatory power and authority. This right does not constitute a property interest protected by the Fifth Amendment."[23] For these reasons, any takings claim must fail.

Similarly lacking in merit are the retroactivity and breach of contract theories that CTIA promotes. Commission action to authorize a new radio service is neither "primarily" nor "secondarily retroactive," as the *Mobile Relay* court once again confirmed. "Retroactive rules 'alter[ ] the past legal consequences of past actions.'"[24] Agency rules that may alter future consequences of a party's actions or that may change business expectations are not retroactive, and "[t]o conclude otherwise would hamstring not only the FCC in its spectrum management, but also any agency whose decision affects the financial expectations of regulated entities."[25] Once again, CTIA has not demonstrated that permitting mobile transmissions in the AWS-3 band would in fact upset the prior expectations of incumbent licensees; but even if it did, this would not make the new rules impermissibly retroactive. Neither are the rules that the Commission may promulgate here likely to be secondarily retroactive, because any rule change that may affect a regulated entity's investment made in reliance on prior regulations need only be reasonable and not arbitrary and capricious to be upheld.[26] The Commission's decision to facilitate new wireless broadband services in the AWS-3 band pursuant to a carefully reasoned decision in this lengthy proceeding surely can meet those tests.[27]

Finally, CTIA claims that any supposed change in the rules affecting existing Commission licensees might violate the contractual relationship the Commission forged with past auction winners that hold licenses in nearby spectrum bands. This last argument fails for much the same reason as CTIA's retroactivity theory. Even though a Commission license does not convey property rights, it does – as CTIA notes – convey certain spectrum usage rights.[28] Nevertheless, there is no basis for a claim that even exclusive usage rights granted to a licensee within a particular spectrum band "prohibit[ ] the Commission from providing for the operation of new radio services, including the operation of [ ] devices that could place

[23] *Mobile Relay Associates v. FCC*, 457 F.3d 1, 12 (D.C. Cir. 2006).

[24] *Id.* at 11 (quoting *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 219 (Scalia, J., concurring) (emphasis in original)).

[25] *Id.*

[26] *See id.*

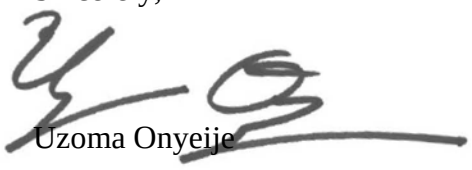
[27] *See DIRECTV v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) ("A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission 'is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,' *Black Citizens for a Fair Media v. FCC*, 719 F2d 407, 411 (D.C. Cir. 1983), if it gives a reasoned explanation for the revision.").

[28] CTIA June 18 *Ex Parte* at 6.

emissions within these bands."[29] The Commission explained in 2003, when considering a challenge to revision of its PCS rules, that to conclude otherwise "would result in halting the further development of new radio services and applications," and that in such circumstances "there could be no Advanced Wireless Services (3G) operations nor [could] . . . any other new communication system be permitted as all of these systems are capable of placing low levels of emissions in the frequency bands allocated for PCS."[30]

Pursuant to Section 1.1206(b) of the Commission rules, an electronic copy of this letter is being filed. Please let me know if you have any questions regarding this submission.

Sincerely,



Uzoma Onyeije

cc: Mr. Aaron Goldberger
Mr. Bruce Gottlieb
Ms. Renee Crittendon
Mr. Wayne Leighton
Ms. Angela Giancarlo
Mr. Joel Taubenblatt

[29] *Revision of Part 15 of the Commission's Rules Regarding Ultra-Wideband Transmission Systems*, Memorandum Opinion and Order and Further Notice of Proposed Rule Making, 18 FCC Rcd 3857, ¶ 74 (2003).
[30] *Id.*